18041

Supreme Court of United States.

SELDEN AND OTHERS

vs.

BOARD OF STATE CANVASSERS,

IN EQUITY, ON APPEAL FROM U. S. CIRCUIT COURT, EASTERN DISTRICT OF VIRGINIA.

No. 190.

JONES AND OTHERS

vs.

BOARD OF STATE CANVASSERS,

IN PROHIBITION, ERROR TO U. S. CIRCUIT COURT, EASTERN DISTRICT OF VIRGINIA.

No. 189.

REPLY BRIEF FOR APPELLEES IN FIRST CASE, AND DEFENDANTS IN ERROR IN SECOND CASE, ON THE MOTION TO DISMISS.

The first question this Court will consider is the motion to dismiss. This motion is upon the ground that there is nothing upon which a decree of injunction or writ of prohibition can now be based, even if the Court were of opinion that the complainants and petitioners would be otherwise entitled to any relief. This is manifest from the prayers for relief, which are, in substance, as follows:

(1) That the Court will determine that the Constitution, schedule and ordinance of registration referred to in the bill and in the petition are null and void;

(2) That the Court will determine that the election held for Representatives in Congress from Virginia on November 4, 1902, was therefore also null and void; and

(3) That the Court will prohibit and restrain the State Board of Canvassers from Canvassing the returns of the said election so held on November 4, 1902; and the Secretary of the Commonwealth from making out and delivering certificates of election to any of the persons who were candidates at the said election.

It is too late to give the relief stated under (3) above; for the Board of State Canvassers and the Secretary of the Commonwealth have done everything there mentioned and sought to be prohibited.

The other relief prayed and mentioned under heads (1) and (2) above could only be given by the Court as incidental to the specific relief prayed under head (3) above, and that for two reasons:

First, Because the Court has no jurisdiction or power to pass upon the validity of the said Constitution, schedule, ordinance, and election as merely abstract questions, as would be the case if it did so independently of the specific relief prayed, or after that relief can no longer be enforced; and

Second, Because the Board of State Canvassers and Secretary of the Commonwealth are not proper defendants to defend the validity of said Constitution, schedule, ordinance, and election, *except so far as their acts* are involved in or affected by those instruments and said election; and the said defendants having done all they have to do, they are not proper parties to defend the *general* validity and constitutionality of said instruments and election as abstract questions, even if the Court had power to pass upon such abstract or moot questions. If there could be such a decision *in thesi* upon the validity of said Constitu-

tion, schedule, ordinance, and election, the more appropriate defendants would be the Governor and Attorney-General. But no such power would exist in the Court, even if the suit were against the Governor (as such) and the Attorney-General, for reasons stated by this Court in *Fitts* v. *McGhee*, 172, U. S., 516, 529, 530, as well as upon other grounds that might be detailed, but need not be; *a fortiori*, no such jurisdiction will be exercised to make an abstract declaration on those subjects in these proceedings against these defendants.

The appellants and plaintiffs in error insist that the injury of which they complain is continuous, and that therefore the Court still has power to give relief in the cases. But we respectfully submit that this contention proceeds upon a misconception as to what constitutes the "injury of which they complain." The injury complained of is the apprehended action of the Board of State Canvassers and the Secretary of the Commonwealth in canvassing the returns of the election of November 4, 1902, and delivering certificates of election pursuant to such canvass. And this injury (if it be an injury) is past and accomplished. If that cause of action had been originally lacking, as for example if the bill in equity and petition in prohibition *had been filed after* the defendants had completed their action in canvassing the returns and delivering the certificates (as they have now done), it is too plain for controversy that the remaining prayers for relief seeking to have the Court make declarations that the Constitution, &c., are void, and that therefore the election of November 4, 1902, is void, would have presented no ground for the judicial action of the Court, but would have been declined as merely inviting the Court's opinion on moot or abstract questions.

And the bill and petition are in the same condition *now* as though they had been originally filed *after* the defendants had acted. It is manifest that it would be impossible now to frame an order under the bill and petition to give effect to the only specific relief prayed for.

It is doubtless true, that in some cases a Court of Equity may retain the bill after the defendant has acted, for the purpose of undoing what he has done; as in the familiar case put of a defendant continuing to construct a wall or other structure after notice of the filing of a bill of injunction to restrain the act of construction. But that principle is applicable only in cases where the undoing of what has been done is within the power of the defendant.

In the cases at bar, the acts done by the State Board of Canvassers consisted in canvassing the returns and declaring the results of the election; and the act on the part of the Secretary of Commonwealth was the delivering of certificates of election to those persons who the Board of Canvassers declared had received a majority of votes cast. And the persons to whom the certificates were so delivered have qualified under such certificates, and are now acting as members of the House of Representatives. The acts of the defendants were done by them in the discharge of their official duties under a statute of the State, and have now passed beyond the control of themselves or of the Court. No decree can be entered now undoing what has been done. The certificates of election cannot be recalled, nor can the rights of the members of the House who have taken their seats in the House of Representatives be in any way affected by any decree of the Court. No decree entered by the Court undertaking to undo what has been done (even if that result could be effected) would either benefit the plaintiffs or affect those persons who received, and have availed themselves of, the certificates of election, and are now acting under them. It can need no argument to prove that the Court will not enter a decree in the air which cannot affect the persons principally concerned, nor in any way help the plaintiffs.

The learned counsel for the appellants and plaintiffs-in-error in his brief upon the motion to dismiss suggests that the defendants are charged with being parties to a conspiracy to recognize as valid the enactments complained of in the bill and

petition, and to do a series of unlawful acts under the said enactments; and that consequently the injury to the complainants' rights is continuous. But we respectfully submit that the charge of conspiracy does not enlarge the power of the Court to pass upon merely abstract rights; and that a decree forbidding the defendants to recognize or act under the said enactments as being valid enactments, would be a decree *in thesi* merely, unless it were preliminary and incidental to specific relief in relation to particular acts apprehended by the complainants on the part of the defendants.

The same learned Counsel also contends in his brief that the Bill and Petition in these cases pray for injunctions against the defendants as to future elections. But we respectfully submit that the learned counsel is mistaken in this statement, as may be seen by reading the prayers of the Bill on pages 16 and 17 of the record, and of the petition for prohibition on page 17 of the record.

The only injunction asked against these defendants in either of those papers is, that they may be enjoined from canvassing the returns and declaring the results of the election held on November 4th, 1902, and delivering the certificates of election under that election.

If it were needful, we respectfully submit that we might go further and maintain, that if there were such prayers as the learned Counsel supposes as to future elections, such prayers would have called for the judgment of the Court in a moot case, because such a decision would be, so far as these defendants are concerned, in advance of any actual controversy between the parties.

The plaintiffs' pleadings and exhibits show, that there was a second registration under the enactments complained of in 1903, at which the complainants may have qualified themselves as voters, as they alleged in their bill and petition they were entitled to do, and at subsequent elections, therefore, they might be entitled to vote, or might actually vote: or it might be that

at such subsequent elections they would have removed from the State; or upon other grounds, and for other reasons, might not have any ground of complaint or controversy against these defendants.

This Court has repeatedly decided, that only such persons as are injuriously affected by a law can complain of its want of constitutionality, and if, therefore, any injunction had been prayed by the complainants and the petitioners in respect to future elections against the defendants to these proceedings, we respectfully submit that such a prayer would have sought the opinion of the Court in advance of an actual controversy, which opinion would be simply a declaration of future rights, and an adjudication upon a moot case. The case of *Cross* v. *DeValle*, 1 Wallace, 5, while involving different questions, throws a light upon the unwillingness of the Court to deal with such future rights before they actually arise.

We repeat, however, that it is not necessary for the Court to pass upon the question just raised, for the reason that the prayers in both the records at bar are limited to an injunction against the defendants in respect to the election held on November the 4th, 1902, and the remainder of the prayers in both cases seeks the opinion and decree of the Court upon purely abstract propositions. Accordingly, no relief within the scope of the bill and petition in these cases can now be granted by the Court.

We respectfully submit that the cases at bar are controlled by the principles settled in *Mills* v. *Green*, 159 U. S., 651. The present cases are unlike *Giles* v. *Harris*, 189 U. S., 475, because in that case the relief sought by the plaintiff was, in part, to be placed on the registration roll, which was a permanent roll, and which it was within the power of the defendants to do, and the Court to compel; and, therefore, though the particular election had been held, the Court could award the plaintiff a part of the *specific relief* prayed for, if he was entitled to it.

That case shows what is meant by the injury or cause of action

being continuous. It does not mean the mere continuance of the abstract questions on which the specific relief is based, or the continued interest of the plaintiffs' in those abstract questions, for in the nature of things such abstractions are necessarily continuous, and generally the plaintiffs' interest in them necessarily continues; but what is meant by the continuance of the injury or cause of action, is that the power of the Court to administer the *specific relief* prayed, or a part of it, still continues; and in that case the Court may continue to entertain the case.

In the present cases, no part of the specific relief prayed for remains to be accomplished, and no relief can now be given by the Court within the scope of the bill or the petition of the plaintiffs. In the case of *Mills* v. *Green*, above cited, this Court held that there was no power to pass upon moot questions after the occasion for *all the specific relief* prayed for had passed.

All of which is respectfully submitted,

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for the Appellees and Defendants-in-Error.